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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
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U.S. Citizenship
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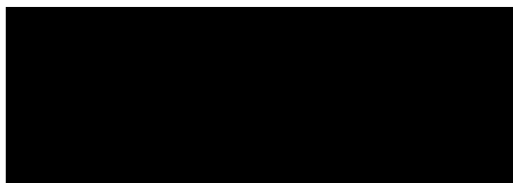


DATE: **MAY 02 2011** Office: CALIFORNIA SERVICE CENTER FILE: 

IN RE: Petitioner: 
Beneficiary: 

PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Director, California Service Center, denied the nonimmigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The AAO will dismiss the appeal.

The petitioner filed this nonimmigrant petition seeking to extend the beneficiary's employment as a nonimmigrant intracompany transferee pursuant to section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L). The petitioner, a general construction company, states that it is a subsidiary of Ascof Construction Company located in the Philippines. The beneficiary was previously granted L-1A status for a period of one year to open a new office in the United States, and the petitioner now seeks to employ the beneficiary as its owner/president for a period of two years.

The director denied the petition concluding that the petitioner failed to establish: (1) that the beneficiary will be employed in the United States in a primarily managerial or executive capacity; and (2) that the petitioner has sufficient physical premises to support a managerial or executive position.

The petitioner subsequently filed an appeal. The director declined to treat the appeal as a motion and forwarded the appeal to the AAO for review. On appeal, counsel for the petitioner asserts that the beneficiary is primarily performing in an executive capacity for the U.S. company, and that the petitioner has sufficient business premises given the nature of the company's business activities. Counsel submits a brief statement on the Form I-290B, Notice of Appeal or Motion, but no brief or additional evidence, in support of the appeal.

I. The Law

To establish eligibility for the L-1 nonimmigrant visa classification, the petitioner must meet the criteria outlined in section 101(a)(15)(L) of the Act. Specifically, a qualifying organization must have employed the beneficiary in a qualifying managerial or executive capacity, or in a specialized knowledge capacity, for one continuous year within three years preceding the beneficiary's application for admission into the United States. In addition, the beneficiary must seek to enter the United States temporarily to continue rendering his or her services to the same employer or a subsidiary or affiliate thereof in a managerial, executive, or specialized knowledge capacity.

The regulation at 8 C.F.R. § 214.2(l)(3) states that an individual petition filed on Form I-129 shall be accompanied by:

- (i) Evidence that the petitioner and the organization which employed or will employ the alien are qualifying organizations as defined in paragraph (l)(1)(ii)(G) of this section.
- (ii) Evidence that the alien will be employed in an executive, managerial, or specialized knowledge capacity, including a detailed description of the services to be performed.
- (iii) Evidence that the alien has at least one continuous year of full-time employment abroad with a qualifying organization within the three years preceding the filing of the petition.

- (iv) Evidence that the alien's prior year of employment abroad was in a position that was managerial, executive or involved specialized knowledge and that the alien's prior education, training, and employment qualifies him/her to perform the intended services in the United States; however, the work in the United States need not be the same work which the alien performed abroad.

The regulation at 8 C.F.R. § 214.2(l)(14)(ii) also provides that a visa petition, which involved the opening of a new office, may be extended by filing a new Form I-129, accompanied by the following:

- (A) Evidence that the United States and foreign entities are still qualifying organizations as defined in paragraph (l)(1)(ii)(G) of this section;
- (B) Evidence that the United States entity has been doing business as defined in paragraph (l)(1)(ii)(H) of this section for the previous year;
- (C) A statement of the duties performed by the beneficiary for the previous year and the duties the beneficiary will perform under the extended petition;
- (D) A statement describing the staffing of the new operation, including the number of employees and types of positions held accompanied by evidence of wages paid to employees when the beneficiary will be employed in a managerial or executive capacity; and
- (E) Evidence of the financial status of the United States operation.

Section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A), defines the term "managerial capacity" as an assignment within an organization in which the employee primarily:

- (i) manages the organization, or a department, subdivision, function, or component of the organization;
- (ii) supervises and controls the work of other supervisory, professional, or managerial employees, or manages an essential function within the organization, or a department or subdivision of the organization;
- (iii) if another employee or other employees are directly supervised, has the authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave authorization), or if no other employee is directly supervised, functions at a senior level within the organizational hierarchy or with respect to the function managed; and
- (iv) exercises discretion over the day-to-day operations of the activity or function for which the employee has authority. A first-line supervisor is not considered to be

acting in a managerial capacity merely by virtue of the supervisor's supervisory duties unless the employees supervised are professional.

Section 101(a)(44)(B) of the Act, 8 U.S.C. § 1101(a)(44)(B), defines the term "executive capacity" as an assignment within an organization in which the employee primarily:

- (i) directs the management of the organization or a major component or function of the organization;
- (ii) establishes the goals and policies of the organization, component, or function;
- (iii) exercises wide latitude in discretionary decision-making; and
- (iv) receives only general supervision or direction from higher-level executives, the board of directors, or stockholders of the organization.

II. The Issues on Appeal

A. Employment in a managerial or executive capacity in the United States

The first issue to be addressed is whether the petitioner established that the beneficiary will be employed in the United States in a primarily managerial or executive capacity.

The petitioner filed the Form I-129, Petition for a Nonimmigrant Worker, on April 10, 2009. The petitioner indicated on the Form I-129 that it operates a general construction company established in 2007 with two employees and gross annual income of \$55,000. In a letter dated April 4, 2009, counsel indicated that the U.S. company has on-going contracts, has hired a project manager to supervise projects and subcontractors, and has received certification to bid on construction contracts initiated by the Los Angeles Unified School District. With respect to the beneficiary's duties as the owner/president of the company, counsel stated:

[The beneficiary's] functions now are solely executive in nature as the Project Manager of the company, [REDACTED] is responsible for day-to-day supervision of all sub-contractors, on-going construction projects and materials purchases. [REDACTED] reports directly to [the beneficiary] and provides weekly status reports of on-going projects.

In addition to reviewing the reports prepared by [REDACTED], [the beneficiary] supervises the submission of proposals for new work, coordinates the marketing activities of the company, reviews company financials to determine staffing needs, ensures that financials goals and targets are being met, and reviews the profitability of on-going projects to ultimately determine bidding and pricing strategies for work proposals prepared by the Project Manager. He is responsible for the overall operation of the company, and engages solely in executive functions.

The petitioner submitted a copy of its IRS Form 941, Employer's Quarterly Federal Tax Return, for the fourth quarter of 2008, which indicates that the company had two employees at the end of the calendar year. The petitioner submitted charts summarizing the company's sales in 2008 (12 jobs totaling \$53,463 between July and December), and 2009 (five jobs totaling \$17,550 in February).

The petitioner provided a copy of the company's original business plan, which indicates that it had anticipated total sales of approximately \$300,000 in 2008 and approximately \$378,000 in 2009. According to the personnel plan, the petitioner anticipated hiring an office clerk, foreman and part-time technical employee in 2008 and two additional personnel in 2009, along with part-time, temporary and contracted personnel who would not be included in payroll costs.

The director issued a request for additional evidence ("RFE") on April 14, 2009 in which he instructed the petitioner to submit, *inter alia*, the following: (1) a copy of the company's organizational chart clearly identifying the beneficiary's position and the employees he supervises by name and job title; (2) a brief description of job duties, educational level, annual salaries/wages and immigration status for all U.S. employees; (3) a more detailed description of the beneficiary's duties indicating the percentage of time spent performing each of the listed duties; and (4) copies of the company's California Forms DE-6, Quarterly Wage Reports for the last four quarters.

In a response dated May 22, 2009, counsel for the petitioner noted that "due to the complex nature of the company (general construction with a specialization in Industrial Piping and Mechanical works projects), the company did take significant time to complete its 'start-up' phase." Counsel explained that the company has started operations and hired an individual to supervise day-to-day tasks, so that the beneficiary may focus "solely on executive functions."

In a letter dated April 30, 2009, the foreign entity further stated:

[The beneficiary] is now focused solely on business development, financial analysis, and evaluation of the efficiency of the company. He reviews status reports prepared by the company's Construction Project Manager, he reviews and oversees the development of the company's marketing plans, he reviews all requests for proposals submitted to [the petitioner] and he reviews all completed bids prior to submission to government and private entities.

The foreign entity noted that, while the petitioner did not meet first year financial expectations, it is "well capitalized, is fully operational and is now in a position to allow [the beneficiary] to focus on solely his executive functions."

In a letter dated May 5, 2009, the petitioner further elaborated on the beneficiary's duties over the previous six months:

- 30% Manage and direct company operations. Distribute funds to support ongoing operations and salaries for the staff. Overview incoming revenue from on-going

construction projects and ensure good relationships with new clients and partners before delegating this function to the company project manager. . . . Plan and develop organization policies and goals, and implement such goals through subordinate personnel;

- 20% Develop corporate short and long term strategies for the company as well as operating policies and procedures to ensure attainment of these corporate objectives. Specifically, review requests for proposals to determine which projects appear to meet the strengths of [the company] and which projects allow [the company] to meet its anticipated profit margins. Review outgoing proposals to confirm accuracy of information contained therein, as well as to confirm that revenue, costs and profit margins meet company thresholds for such projects;
- 20% Review status reports prepared by the construction project manager to ensure compliance with project benchmarks. Review company financials on an as needed basis to confirm revenues, cash flow, and per project profits meet company minimums. Direct technological planning and development. Oversee the technology research and development efforts leading to new or improved systems.
- 20% Communicate and maintain technology development and marketing policies. Analyze budgets and costs for the development of intellectual property and personnel training needed for company projects and programs. Review company expenditures to ensure compliance with project budgets, as well as to maintain completed budgets. Assess effectiveness of ongoing marketing strategies and work with company personnel to develop plans to make inroads into other geographic regions to increase company revenue streams.
- 10% Review activity reports and financial statement to determine progress and status in attaining financial objectives and forecasts. Revise such objectives and plans in accordance with current conditions. Direct and coordinate overall company operations to ensure maximum returns on investment capital and to increase revenue and profitability. Review company performance and establish policies and goals which are expected to enhance company performance.

The petitioner also included a list of specific policies and goals the beneficiary implemented over the previous six months, including: revising sales and net income projections for 2009; directing the company's entry into the public entity construction sector; expanding service offerings to include general contracting services; establishing safety and training policies; delegating certain authorities to the construction project manager; authorizing budget and capital expenditures; and setting contract goals.

The petitioner stated that the company "has a U.S. employee, one other specialized employee, and contracts with numerous independent contractors and sub-contractors on a per-project basis."

The director denied the petition on June 2, 2009, concluding that the petitioner failed to establish that the beneficiary will be employed in a primarily managerial or executive capacity under the extended petition. In denying the petition, the director observed that the petitioner provided a vague position description that failed to explain what the beneficiary primarily does on a day-to-day basis. The director also found that the petitioner did not clearly state whether it was claiming that the beneficiary would be employed in a managerial capacity or in an executive capacity, and emphasized that the petitioner cannot attempt to establish the beneficiary's eligibility as a "hybrid" manager/executive. Finally, the director noted that the petitioner failed to provide position descriptions for the beneficiary's subordinates, and thus did not establish that the company's two other employees are able to relieve the beneficiary from performing primarily non-managerial duties associated with the day-to-day operations of the company.

On appeal, counsel asserts that the petitioner has consistently claimed that the beneficiary is employed in an executive capacity and did not attempt to establish that the beneficiary will be a "manager." Counsel asserts that the director had no basis to conclude that the petitioner represented the beneficiary as a "hybrid" manager/executive. Counsel further contends that the director inappropriately determined that the job duties the petitioner provided were "vague and nonspecific." Counsel emphasizes that the position description included nine specific examples of goals implemented by the beneficiary during the first year of operations.

Upon review, and for the reasons stated herein, the petitioner has not established that the beneficiary will be employed in a primarily managerial or executive capacity under the extended petition.

When examining the executive or managerial capacity of the beneficiary, the AAO will look first to the petitioner's description of the job duties. *See* 8 C.F.R. § 214.2(l)(3)(ii). The petitioner's description of the job duties must clearly describe the duties to be performed by the beneficiary and indicate whether such duties are in either an executive or a managerial capacity. *Id.* The AAO acknowledges that the petitioner has consistently claimed that the beneficiary performs primarily executive duties as defined under section 101(a)(44)(B) of the Act. At a minimum, the petitioner must demonstrate that the beneficiary's responsibilities will meet the requirements of one or the other capacity.

The definitions of executive and managerial capacity each have two parts. First, the petitioner must show that the beneficiary performs the high-level responsibilities that are specified in the definitions. Second, the petitioner must show that the beneficiary *primarily* performs these specified responsibilities and does not spend a majority of his or her time on day-to-day functions. *Champion World, Inc. v. INS*, 940 F.2d 1533 (Table), 1991 WL 144470 (9th Cir. July 30, 1991).

The petitioner initially indicated that the beneficiary's duties "are solely executive" and include reviewing reports prepared by the company's project manager, supervising the submission of proposals for new work, coordinating marketing activities, reviewing company financials, reviewing the profitability of projects, determining bidding and pricing strategies, and being "responsible for the overall operation of the company." The AAO notes that few of these activities, in fact, clearly fall under the statutory definition of executive capacity, particularly in light of the petitioner's claimed staffing level of two employees. Based on this initial description, it was unclear who is responsible for the non-executive tasks associated with the day-to-day operations of the business, such as the marketing and financial activities the beneficiary is claimed to supervise and coordinate, not to mention the actual construction work performed by the company. Therefore,

the director reasonably requested additional evidence pertaining to the beneficiary's actual duties and the amount of time he devotes to each type of task, the number of subordinate employees and their job duties, and evidence of wages paid to employees. The regulations at 8 C.F.R. §§ 214.2(l)(14)(ii)(C) and (D) require a statement of the duties performed by the beneficiary for the previous year and the duties the beneficiary will perform under the extended petition, as well as a statement describing the staffing of the new operation, including the number of employees and types of positions held accompanied by evidence of wages paid to employees.

The petitioner's description of the beneficiary's duties submitted in response to the request for evidence, while lengthy, paraphrases portions of the statutory definition of executive capacity at section 101(a)(44)(B) of the Act, and falls significantly short of specifically defining how much time the beneficiary devotes to executive tasks on a day-to-day basis. For example, the petitioner indicates that the beneficiary devotes 30 percent of his time to "manage and direct company operations" and indicates that this duty involves planning, developing and implementing goals, distributing funds, reviewing incoming revenue and ensuring good relationships with new clients and partners. The petitioner does not discuss how the beneficiary's time is divided among these four disparate functions, not all of which appear to be associated with "directing" the company's overall operations. Without further explanation, duties such as ensuring client and partner relations may be considered marketing or operational tasks, rather than executive-level duties.

The petitioner indicates that the beneficiary devotes an additional 20 percent of his time to "develop short and long term strategies" and "operating policies and procedures." The petitioner did not indicate how this responsibility differs from the above-referenced responsibility to "plan and develop organization policies and goals." The petitioner indicates that this area of responsibility includes reviewing requests for proposals and outgoing proposals to confirm accuracy of information. These specific supervisory tasks have not been shown to be executive in nature and do not appear to be directly related to the petitioner's long-term strategies and operating policies, as claimed by the petitioner.

Based on the petitioner's description, the beneficiary devotes an additional 20% of his time to reviewing status reports to ensure compliance with project benchmarks, reviewing company financials, and directing and overseeing the company's technology research and development efforts "leading to new or improved systems." Again, these three tasks, while grouped together under one heading, appear to be largely unrelated and the petitioner fails to indicate how much time the beneficiary devotes to reviewing reports, reviewing financials or overseeing technology and research and development efforts. It is unclear who on the petitioner's one- to two-person subordinate staff is actually charged with performing day-to-day activities associated with technology planning, research or development, or what types of "systems" the company is attempting to develop or improve. Moreover, the petitioner has not established who actually performs the day-to-day financial activities of the company.

The petitioner indicates that the beneficiary devotes an additional 20 percent of his time to "communicate and maintain technology development and marketing policies," a duty that includes analyzing budgets and costs for intellectual property and personnel training, reviewing company expenditures, and assessing the effectiveness of on-going marketing strategies. The petitioner does not explain what technology or intellectual property is being developed by the petitioner's construction contracting firm or who is developing it, identify who is responsible for carrying out the company's day-to-day marketing activities, or who is responsible for personnel training.

Finally, the petitioner indicates that the beneficiary devotes an additional ten percent of his time to "review activity reports and financial statements to determine progress and status," a responsibility that is essentially included in several of the above-referenced duties. The petitioner repeats its broad statements that the beneficiary is responsible to "direct and coordinate overall company operations," to "establish policies and goals," and to revise the company's "objectives and plans."

Overall, the AAO concurs with the director's observation that the position description submitted in response to the RFE is vague and offers little insight into what the beneficiary primarily does on a day-to-day basis as the "owner/president" of the petitioner's two- to three-personal general contracting company. Reciting the beneficiary's vague job responsibilities or broadly-cast business objectives is not sufficient; the regulations require a detailed description of the beneficiary's daily job duties. The petitioner has failed to provide any detail or explanation of the beneficiary's activities in the course of his daily routine. The actual duties themselves will reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103, 1108 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990). Specifics are clearly an important indication of whether a beneficiary's duties are primarily executive or managerial in nature, otherwise meeting the definitions would simply be a matter of reiterating the regulations. *Id.*

The fact that the beneficiary manages or directs a business does not necessarily establish eligibility for classification as an intracompany transferee in a managerial or executive capacity within the meaning of sections 101(a)(15)(L) of the Act. *See* 52 Fed. Reg. 5738, 5739-40 (Feb. 26, 1987) (noting that section 101(a)(15)(L) of the Act does not include any and every type of "manager" or "executive"). While the AAO does not doubt that the beneficiary exercises discretion over the petitioner's day-to-day operations and acknowledges that the petitioner has identified specific policies implemented by the beneficiary, the petitioner has failed to demonstrate that his actual day-to-day duties as of the date of filing would be primarily managerial or executive. Due to the deficiencies discussed above, the petitioner's description of the beneficiary's job duties does not establish what proportion of the beneficiary's duties is executive in nature, and what proportion is actually non-executive. *See Republic of Transkei v. INS*, 923 F.2d 175, 177 (D.C. Cir. 1991).

Beyond the required description of the job duties, U.S. Citizenship and Immigration Services (USCIS) reviews the totality of the record when examining the claimed managerial or executive capacity of a beneficiary, including the petitioner's organizational structure, the duties of the beneficiary's subordinate employees, the presence of other employees to relieve the beneficiary from performing operational duties, the nature of the petitioner's business, and any other factors that will contribute to a complete understanding of a beneficiary's actual duties and role in a business. The petitioner claims that substantially all non-qualifying tasks are performed by the beneficiary's subordinates and contracted staff and that the beneficiary's duties are "solely executive."

Upon review, the petitioner has not clearly explained or documented the number or types of workers it employed at the time of filing. The petitioner stated on Form I-129 that it had two workers as of the date of filing on April 10, 2009, and the petitioner's California Form DE-6 for the first quarter of 2009 indicates that the company has three employees, including the beneficiary, his spouse, and the individual identified as "construction project manager." The petitioner has not provided a job description for the beneficiary's spouse nor included her when discussing the staffing levels of the U.S. company, and it is not clear whether the petitioner intended to employ her under the extended petition. When responding to the RFE, the petitioner

stated that it has "a U.S. employee, one other specialized employee, and contracts with numerous independent contractors and sub-contractors on a per-project basis." The director specifically requested a list of employees by name and job title, along with information such as job descriptions for all employees and the salary or wages paid to each employee. While it appears that the petitioner does in fact employ the claimed project manager, the record does not clearly establish who the "specialized employee" is or what duties he or she performs. The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. *See* 8 C.F.R. § 103.2(b)(14).

Although the petitioner claims that it utilizes the services of contractors on a per-project basis, the petitioner has neither presented evidence to document the existence and prior use of these employees nor identified the specific services these individuals provide. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm'r. 1972)). Absent evidence documenting the existence of such contractors, the petitioner has not established who relieves the beneficiary and the project manager from directly providing the petitioner's services.

The statutory definition of the term "executive capacity" focuses on a person's elevated position within a complex organizational hierarchy, including major components or functions of the organization, and that person's authority to direct the organization. Section 101(a)(44)(B) of the Act, 8 U.S.C. § 1101(a)(44)(B). Under the statute, a beneficiary must have the ability to "direct the management" and "establish the goals and policies" of that organization. Inherent to the definition, the organization must have a subordinate level of employees for the beneficiary to direct and the beneficiary must primarily focus on the broad goals and policies of the organization rather than the day-to-day operations of the enterprise. An individual will not be deemed an executive under the statute simply because they have an executive title or because they "direct" the enterprise as the owner or sole managerial employee. The beneficiary must also exercise "wide latitude in discretionary decision making" and receive only "general supervision or direction from higher level executives, the board of directors, or stockholders of the organization." *Id.*

Given that the petitioner appears to have no more than two employees and an unidentified and undocumented number of contractors working subordinate to the beneficiary, it is essential that the petitioner document the existence of such employees and provide a clear and credible description of their actual numbers and duties so that USCIS can determine whether the subordinate employees could reasonably relieve the beneficiary from performing the non-executive functions of the company on a day-to-day basis. USCIS will not make assumptions about what duties may or may not be performed by the subordinate workers. The petitioner has not sufficiently corroborated its claim that the beneficiary, as of the date of filing, is primarily focused on the broad goals and policies of the petitioning company and is relieved from performing non-executive tasks associated with operating a general contracting business.

The petitioner has not claimed, and the record does not establish, that the beneficiary would be employed in the alternative in a managerial capacity. The statutory definition of "managerial capacity" allows for both "personnel managers" and "function managers." *See* section 101(a)(44)(A)(i) and (ii) of the Act, 8 U.S.C. § 1101(a)(44)(A)(i) and (ii). Personnel managers are required to primarily supervise and control the work of other supervisory, professional, or managerial employees. Contrary to the common understanding of the word "manager," the statute plainly states that a "first line supervisor is not considered to be acting in a managerial capacity merely by virtue of the supervisor's supervisory duties unless the employees supervised

are professional." Section 101(a)(44)(A)(iv) of the Act; 8 C.F.R. § 214.2(l)(1)(ii)(B)(2). If a beneficiary directly supervises other employees, the beneficiary must also have the authority to hire and fire those employees, or recommend those actions, and take other personnel actions. 8 C.F.R. § 214.2(l)(1)(ii)(B)(3). Here, the petitioner does not claim that the beneficiary supervises any professional workers. While the beneficiary appears to supervise a project manager and an unidentified "specialized employee" the petitioner has not established through submission of relevant evidence that either of these employees acts in a supervisory or managerial capacity, other than in job title alone. In order to be a supervisor, the employee must be shown to possess some significant degree of control or authority over the employment of a subordinate. *See generally Browne v. Signal Mountain Nursery, L.P.*, 286 F.Supp.2d 904, 907 (E.D. Tenn. 2003) (Cited in *Hayes v. Laroy Thomas, Inc.*, 2007 WL 128287 at *16 (E.D. Tex. Jan. 11, 2007)). As discussed above, the petitioner has not documented the petitioner's use of contractors and thus has not documented the project manager's claimed authority over such temporary workers.

The term "function manager" applies generally when a beneficiary does not supervise or control the work of a subordinate staff but instead is primarily responsible for managing an "essential function" within the organization. *See* section 101(a)(44)(A)(ii) of the Act, 8 U.S.C. § 1101(a)(44)(A)(ii). The term "essential function" is not defined by statute or regulation. If a petitioner claims that the beneficiary is managing an essential function, the petitioner must furnish a detailed description of the duties to be performed in managing the essential function, i.e. identify the function with specificity, articulate the essential nature of the function, and establish the proportion of the beneficiary's daily duties attributed to managing the essential function. *See* 8 C.F.R. § 214.2(l)(3)(ii). In addition, the petitioner's description of the beneficiary's daily duties must demonstrate that the beneficiary manages the function rather than performs the duties related to the function. Here, the petitioner has not articulated a claim that the beneficiary manages an essential function of the petitioning organization. Furthermore, absent a clear and credible breakdown of the time spent by the beneficiary performing his duties, the AAO cannot determine what proportion of his duties would be managerial or executive, nor can it deduce whether the beneficiary is primarily performing the duties of a function manager. *See IKEA US, Inc. v. U.S. Dept. of Justice*, 48 F. Supp. 2d 22, 24 (D.D.C. 1999).

The AAO notes that a company's size alone, without taking into account the reasonable needs of the organization, may not be the determining factor in denying a visa to a multinational manager or executive. *See* § 101(a)(44)(C) of the Act, 8 U.S.C. § 1101(a)(44)(C). However, in reviewing the relevance of the number of employees a petitioner has, federal courts have generally agreed that USCIS "may properly consider an organization's small size as one factor in assessing whether its operations are substantial enough to support a manager." *Family Inc. v. U.S. Citizenship and Immigration Services* 469 F. 3d 1313, 1316 (9th Cir. 2006) (citing with approval *Republic of Transkei v. INS*, 923 F.2d. 175, 178 (D.C. Cir. 1991); *Fedin Bros. Co. v. Sava*, 905 F.2d 41, 42 (2d Cir. 1990)(per curiam); *Q Data Consulting, Inc. v. INS*, 293 F. Supp. 2d 25, 29 (D.D.C. 2003)). It is appropriate for USCIS to consider the size of the petitioning company in conjunction with other relevant factors, such as a company's small personnel size, the absence of employees who would perform the non-managerial or non-executive operations of the company, or a "shell company" that does not conduct business in a regular and continuous manner. *See, e.g. Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001).

Furthermore, in the present matter, regulations provide strict evidentiary requirements for the extension of a "new office" petition and require USCIS to examine the organizational structure and staffing levels of the petitioner. *See* 8 C.F.R. § 214.2(l)(14)(ii)(D). The regulation at 8 C.F.R. § 214.2(l)(3)(v)(C) allows the "new

office" operation one year within the date of approval of the petition to support an executive or managerial position. There is no provision in USCIS regulations that allows for an extension of this one-year period. If the business does not have sufficient staffing after one year to relieve the beneficiary from primarily performing operational and administrative tasks, the petitioner is ineligible by regulation for an extension. In the instant matter, the petitioner has not reached the point that it can employ the beneficiary in a predominantly managerial or executive position.

At the time of filing, the petitioner was a nearly two-year-old construction company which employed the beneficiary as president, a project manager, and perhaps one "specialized employee." The petitioner has not documented the number of types of temporary workers or contractors working for the company or provided evidence of payments to such workers, nor has it submitted clear descriptions of the duties performed by the beneficiary's subordinates. The petitioner reasonably requires employees to purchase materials and tools, handle sales calls, develop client relationships, market the petitioner's services, locate opportunities for bids, obtain project specifications and estimate project costs, hire contractors, issue invoices, perform the actual construction services, handle bookkeeping and banking tasks, and perform administrative and clerical tasks associated with operating a business. While the petitioner claims that some of these tasks are delegated to the project manager, the petitioner has not demonstrated who would perform many of these tasks or established how the project manager singlehandedly performs such duties.

Upon review of the totality of the evidence, the petitioner has not supported its claim that the beneficiary's duties are "solely" or even "primarily" executive in nature, or that he spends essentially all of his time reviewing reports and developing and implementing company policies and goals at the company's current stage of development. A comparison of the company's projected versus actual financial results and personnel levels reveals that the U.S. company has not grown as quickly as anticipated and does not currently have a reasonable need for an employee who performs primarily executive tasks.

Regardless, the reasonable needs of the petitioner serve only as a factor in evaluating the lack of staff in the context of reviewing the claimed managerial or executive duties. The petitioner must still establish that the beneficiary is to be employed in the United States in a primarily managerial or executive capacity, pursuant to sections 101(a)(44)(A) and (B) or the Act. As discussed above, the petitioner has not established this essential element of eligibility.

The petitioner has not submitted evidence on appeal to overcome the director's determination that the beneficiary will not be employed in a managerial or executive capacity. Accordingly, the appeal will be dismissed.

B. The Petitioner's Physical Premises

The remaining issue addressed by the director is whether the petitioner "has secured sufficient physical premises to support an L-1A Manager/Executive." The director acknowledged that the petitioner submitted a lease for the premises located at [REDACTED], noting that "the petitioner's description of a lease is actually a Service Agreement of a Virtuoso Office." The director noted that the lease expires on November 30, 2009, and concluded that "it is apparent that the office space leased is a virtual office," noting that "it is unknown whether the office space is sufficient to house the employment of an L-1A manager or executive and support staff." Finally, the director noted that, according to the petitioner's

business plan, the company anticipates employing a total of eleven employees by 2011, which falls within the requested validity period of the petition. The director found that the petitioner does not appear to have the physical premises to support the proposed staffing.

On appeal, counsel emphasizes that the petitioner operates a general contracting firm whose work is primarily performed outside of its office. Counsel asserts that the business premises are sufficient when the nature of the business is considered.

The AAO will withdraw the director's determination with respect to this issue. Upon review of the petitioner's service agreement and photographs of its office, it is evident that the petitioner does in fact have a physical office and not a "virtual office" as suggested by the director. The office also appears to be of sufficient size to accommodate the petitioner's current workforce of two to three employees. The director cited no statute or regulation requiring a petitioner filing an extension of a "new office" petition to establish that it has acquired physical premises to accommodate future proposed staffing levels.

C. Qualifying Relationship

Beyond the decision of the director, a remaining issue is whether the petitioner maintains a qualifying relationship with the beneficiary's foreign employer. To establish a "qualifying relationship" under the Act and the regulations, the petitioner must show that the beneficiary's foreign employer and the proposed U.S. employer are the same employer (i.e. one entity with "branch" offices), or related as a "parent and subsidiary" or as "affiliates." See generally section 101(a)(15)(L) of the Act; 8 C.F.R. § 214.2(l).

The petitioner claims that the beneficiary's foreign employer, [REDACTED], owns 80 percent of the U.S. company while [REDACTED] owns the remaining 20 percent. The petitioner submitted a "Special Meeting of the Board of Directors" of the U.S. company indicating that the beneficiary and his spouse resolved on March 6, 2008 that [REDACTED] would acquire a 20 percent interest in the company.

The petitioner submitted copies of its stock certificates numbers 2 and 3, which indicate on their face that the U.S. company is authorized to issue 100,000 shares of common stock. Stock certificate number [REDACTED] shows that 800 shares were issued the Ascof Construction Company on March 6, 2008, while stock certificate number [REDACTED] indicates that 200 shares were issued to [REDACTED] on that date.

The petitioner also submitted a copy of its 2007 IRS Form 1120, U.S. Corporation Income Tax Return, for the tax year ended on April 30, 2008. The Form 1120 at Schedule E indicates that the beneficiary owns 29 percent of the common stock of the U.S. company. At Schedule K, Item 5, the tax return indicates that one individual, partnership, corporation, estate or trust owns 51 percent of the U.S. company. The tax return indicates that the company has two shareholders and that neither shareholder is foreign, but it also indicates that two Forms 5472, Information Return of a 25% Foreign-Owned U.S. Corporation, were attached. The petitioner did not submit any accompanying statements or copies of the Forms 5472.

The regulation and case law confirm that ownership and control are the factors that must be examined in determining whether a qualifying relationship exists between United States and foreign entities for purposes

of this visa classification. *Matter of Church Scientology International*, 19 I&N Dec. 593 (BIA 1988); *see also Matter of Siemens Medical Systems, Inc.*, 19 I&N Dec. 362 (BIA 1986); *Matter of Hughes*, 18 I&N Dec. 289 (Comm. 1982). In the context of this visa petition, ownership refers to the direct or indirect legal right of possession of the assets of an entity with full power and authority to control; control means the direct or indirect legal right and authority to direct the establishment, management, and operations of an entity. *Matter of Church Scientology International*, 19 I&N Dec. at 595.

As general evidence of a petitioner's claimed qualifying relationship, stock certificates alone are not sufficient evidence to determine whether a stockholder maintains ownership and control of a corporate entity. The corporate stock certificate ledger, stock certificate registry, corporate bylaws, and the minutes of relevant annual shareholder meetings must also be examined to determine the total number of shares issued, the exact number issued to the shareholder, and the subsequent percentage ownership and its effect on corporate control. Additionally, a petitioning company must disclose all agreements relating to the voting of shares, the distribution of profit, the management and direction of the subsidiary, and any other factor affecting actual control of the entity. *See Matter of Siemens Medical Systems, Inc.*, *supra*. Without full disclosure of all relevant documents, USCIS is unable to determine the elements of ownership and control.

Upon review of the evidence submitted, the petitioner has not adequately documented that the U.S. company is a subsidiary of the beneficiary's foreign employer. The petitioner has not submitted copies of all of its issued and canceled stock certificates or its stock ledger confirming the total number of shares issued to date. Furthermore, the claim that the foreign entity owns 80 percent of the petitioner's shares is not corroborated by the petitioner's 2007 tax return, which post-dates the March 2008 stock transaction and should reflect the stated ownership of the U.S. company. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

Due to the deficiencies and discrepancies noted above, the petitioner has not established that it maintains a qualifying relationship with the beneficiary's foreign employer as required by 8 C.F.R. § 214.2(l)(14)(ii)(A). For this additional reason, the petition cannot be approved.

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004)(noting that the AAO conducts appellate review on a *de novo* basis).

III. Conclusion

Based on the foregoing discussion, the AAO concurs with the director's conclusion that the petitioner failed to establish that the beneficiary will be employed in the United States in a primarily managerial or executive capacity. The AAO further finds that the petitioner failed to establish that it maintains a qualifying relationship with the beneficiary's foreign employer.

The petition will be denied and the appeal dismissed for the above stated reasons, with each considered as an independent and alternative basis for the decision. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The appeal is dismissed.